United Nations CCPR/C/SR.2609

International Covenant on Civil and Political Rights

Distr.: General
14 April 2009

Original: English

Human Rights Committee
Ninety-fifth session

Summary record of the 2609th meeting
Held at Headquarters, New York, on Monday, 23 March 2009, at 3 p.m.

Chairperson: Mr. Iwasawa

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The meeting was called to order at 3 p.m.

Consideration of reports submitted by States parties under article 40 of the Covenant (*continued*)

Fifth periodic report of Australia
(CCPR/C/AUS/5; CCPR/C/AUS/Q/5 and Add.1)

1. *At the invitation of the Chairperson, the members of the delegation of Australia took places at the Committee table.*

2. **Mr. Goledzinowski** (Australia), introducing the report (CCPR/C/AUS/5), observed that his Government believed the best way to improve the observance of human rights was through both domestic action and a stronger engagement with the United Nations human rights treaty framework. On the domestic side, a national human rights consultation process had been launched in December 2008 to raise awareness and to seek the views of the diverse Australian community on how human rights and responsibilities should best be protected in the future. The independent National Human Rights Consultation Committee conducting the process would report to the Government in August 2009.

3. Aware that its indigenous people were disadvantaged in certain areas, the current Government was committed to a renewed engagement of the nation with its indigenous peoples, based on reconciliation, mutual respect and understanding. Moving beyond the historic apology to Indigenous Australians in February 2008 — a symbolic first step to build trust and good faith — the Federal, state and territorial governments had agreed on a strategy for closing the gap between indigenous and non-indigenous Australians in urban, regional and remote areas, targeting increased life expectancy, childhood health and development, housing, education, employment and remote service delivery.

4. Although the country's immigration system aimed to ensure that all were treated justly and with dignity, it was a challenge to balance the desires of those seeking asylum with efforts to ensure adequate protection of Australia's borders. There had been several significant reforms since the periodic report had been issued: the policy of transferring asylum-seekers to processing centres outside Australia — the "Pacific Solution" — had been ended; although there was still mandatory detention for unauthorized arrivals while health, character and identity checks were made, the Government's new risk-based approach was to use detention only as a last resort, for the shortest practicable period and never indefinitely or arbitrarily, and all cases of those held for more than two years had been reviewed; temporary protection visas had been abolished and their holders had been given access to permanent residence visas and the full range of entitlements, including family reunion and support services similar to those available to citizens. The Government was committed to finding durable solutions to protracted refugee situations, and the entire refugee assessment process was governed by procedural fairness, independent merits review and oversight by the Immigration Ombudsman.

5. Reforms had been made in relation to same-sex issues: 84 federal laws had been amended to remove discrimination against same-sex couples and their children, following the Committee's consideration of *Young v. Australia*. The changes, which would be implemented by July 2009, covered areas such as veterans' entitlements, taxation, social security, health, care of the elderly, superannuation, immigration, child support and family law.

6. The Government was committed to ensuring that its strong counter-terrorism laws, needed to protect national security, at the same time complied with its obligation to advance human rights. After various national security reviews, safeguards had been proposed, such as the appointment of a national security legislation monitor, the establishment of parliamentary oversight of the federal police and extension of the mandate of the Inspector General of Intelligence and Security.

7. On the international front, Australia had ratified or was actively considering several more international human instruments: the Optional Protocol to the Convention on the Elimination of All Forms of Discrimination against Women had entered into force in Australia in 2009; it had ratified the Convention on the Rights of Persons with Disabilities in July 2008 and would soon be a party to its Optional Protocol; and it was working towards acceding to the Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment. As further evidence of its willingness to engage positively with the international community, it had in August 2008 extended a standing invitation to United Nations human rights mechanisms to visit Australia.

8. **The Chairperson** invited the delegation to address questions 1 to 12 on the list of issues (CCPR/C/AUS/Q/5).

9. **Mr. Campbell** (Australia), referring to the issue of the constitutional and legal framework and to question 1, said that since Australia's approach was always to ensure that domestic legislation, policies and practices complied with any international treaty prior to ratifying it, direct enactment of the Covenant into law had not been considered necessary. The Covenant fell under the Human Rights and Equal Opportunity Commission Act 1986, and thus the Australian Human Rights Commission could report to the Attorney General findings and recommendations regarding any Government breach of Covenant rights, which were then reported to Parliament. Paragraphs 2, 3 and 4 of the Government's written replies (CCPR/C/AUS/Q/5/Add.1) to the list of issues discussed other relevant constitutional, legislative and administrative provisions. The national human rights consultation (written replies, paras. 6-8) was another way in which the Government was seeking to enforce human rights.

10. The Australian Government currently had no intention of withdrawing its still necessary reservations to the Covenant (question 2). Concerning the reservation to article 10, paragraph 2 (a), of the Covenant, the country's states and territories endeavoured to separate remand detainees from convicted convicts wherever possible, although in the short term that might not be practicable in some circumstances. Furthermore, regarding Australia's reservation to article 10, paragraph 2 (b) and paragraph 3, it was not desirable to separate juvenile offenders from adults in circumstances, that might entail solitary confinement or living in less amenable conditions. Since article 14, paragraph 6, of the Covenant required statutory compensation for miscarriage of justice, a reservation had been entered because compensation did not necessarily have a statutory basis in Australia. Lastly, Australia's strong tradition of freedom of expression, according to which it was inappropriate to criminalize thoughts, even when they extended to racial or religious hatred, required the reservation to article 20.

11. With regard to question 3, although in five of the cases cited by the Committee, Australia had not accepted the Committee's Views because they raised immigration issues, the Government's current approach was in fact to ensure that detention was used only as a last resort, and to require the Department of Immigration to justify any decision to detain. There was nothing to add to the written reply (para. 14) on the *Young* case, and the unique situation that had been the subject of the *Cabal and Pasini* case had never recurred.

12. In addition to what was stated in the written reply to question 4, it should be noted that Australian officials and defence forces overseas had a duty to respect local law as well as to comply with Australian criminal law that had extraterritorial application; and that the Australian laws in question reflected international human rights standards, such as the prohibition on torture.

13. Regarding the compatibility of Australia's anti-terrorism legislation with Covenant rights (question 5), it should be added that the new questioning and detention powers of the Australian intelligence agency were subject to scrutiny by the Inspector General of Intelligence and Security and the Parliamentary Joint Committee on Intelligence and Security. The Australian Security Intelligence Organization Act of 1979 itself had included safeguards against cruel, inhuman or degrading treatment of suspects and specific safeguards regarding time limits, access to a lawyer and the like during questioning and detention. Also, under the Criminal Code, a court had to determine in advance if a control order requested by the police to prevent a terrorist act was reasonably necessary and appropriate. Preventive detention orders under the Criminal Code were also subject to a number of specific human rights safeguards, as were the stop-search-and-question powers of the police.

14. **Ms. Nolan** (Australia), replying to question 6, provided a detailed account of the federally funded initiatives, including legal assistance and crime prevention programmes, that sought to address the overrepresentation of indigenous Australians in the criminal justice system. In addition, the states and territories had a range of programmes of their own, including the establishment of local indigenous courts, community justice groups and indigenous liaison officers.

15. Rather than "overhauling" the native title system (question 7 (a)) the Government was seeking to make it more flexible, while reducing the backlog of claims. The new approach was to treat native title as one

means of addressing broader economic and social development concerns, by, for instance, encouraging the parties to negotiate land or enterprise management opportunities in return for resolving claims. In March, the Native Title Amendment Bill 2009 had been introduced, supporting a more equitable, negotiation-focused approach and giving the Federal Court control over all native title claims from beginning to end. After wide consultation, the Bill also included a number of possible minor amendments to the Native Title Act 1993. The key to the Government's approach, at all levels of government, was behavioural change by all parties involved in the native title system. In addition to the Joint Working Group on Indigenous Land Settlements discussed in the written replies (para. 41), an expert Native Title Payments Working Group focusing on native title agreements with the mining and resource industry had been set up.

16. **Mr. Smith** (Australia), referring to question 7 (b), observed that the key recommendations made by the Aboriginal and Torres Strait Islander Social Justice Commission in its 2007 report were outlined in the written replies (para. 45). The Government was working with state and territory governments and community service providers to stop the abuse and neglect of indigenous women and children. A national plan focusing on offering support to victims, improving the legal system and changing attitudes through education was being developed, as was a national child protection framework. In response to the Social Justice Commission's recommendation on information-sharing, several clearing houses, as indicated in the written replies (para. 52), already operated to provide specific information on family violence, abuse and child protection topics.

17. **Ms. Nolan** (Australia) said regarding the disproportionate number of indigenous children in the juvenile justice system (question 8) that her Government was working with state and territory officials to draft a National Indigenous Law and Justice Framework, which would build a government and community partnership approach to the issue. In addition to the Federal rehabilitation programme and the various state and territorial programmes discussed in the written replies (paras. 56 and 60), the Family Violence Prevention Legal Services Program had an early intervention component that helped young indigenous people to build self-esteem, achieve personal goals, avoid substance abuse and the like, in order to help divert them away from the juvenile justice system.

18. The Federal, state and territorial governments, aware of the disproportionate number of mentally disabled children in the juvenile justice system, had therefore established the programmes outlined in the written replies (paras. 61-63) as well as another in Queensland, all of which aimed to provide early and integrated mental health services to such at-risk youth in order to keep them out of the juvenile justice system later on.

19. **Mr. Smith** (Australia), also responding to question 8, said that the Government accepted that untreated or poorly treated mental illness in young people was associated with downstream juvenile justice issues. Early intervention in terms of integrated mental health service delivery was essential. Alongside the Headspace project, individual states and territories were working to reduce the disproportionate number of children with cognitive disabilities and mental health issues in the juvenile justice system, as described in paragraphs 63 and 64 of the written replies.

20. Responding to question 9, he said that the Board of Inquiry into the Protection of Aboriginal Children from Sexual Abuse in the Northern Territory had found that child abuse was serious, widespread and grossly underreported in Aboriginal communities in the Northern Territory; that Aboriginal communities in other States faced similar problems; and that prompt and firm decisions were required. The report contained over 90 recommendations covering many areas. First and foremost, the Board had recommended that both the federal Government and the Northern Territory government should make sexual abuse of Aboriginal children in the Northern Territory an issue of urgent national significance and undertake to engage in genuine consult action with Aboriginal peoples when designing initiatives for them.

21. In recognition of the seriousness of the concerns identified in that and other reports, the previous Government had launched the Northern Territory Emergency Response. The three emergency response bills passed by Parliament in August 2007 aimed at protecting children and making communities safe, and at laying the foundations for a sustainable future for indigenous peoples in the Northern Territory.

22. The Northern Territory Emergency Response Review Board referred to in paragraph 73 of the

written replies had found that the situation in remote Northern Territory communities and town camps remained sufficiently acute to be described as a national emergency, that the Emergency Response should therefore continue, and that the decision to impose the Emergency Response without seeking the views of those affected had left Aboriginal peoples feeling hurt, betrayed and less worthy than other Australians and had undercut the potential effectiveness of many measures. On 23 October 2008, the Government had released an interim response to the Review Board's report in which it had agreed to continue the Northern Territory Emergency Response; to ensure that measures under it were either more clearly special measures or non-discriminatory and did not involve suspension of the Racial Discrimination Act 1975; and to consult indigenous peoples during the process. Legislation reflecting that policy would be introduced at the Parliament's 2009 spring sittings, which would begin in August 2009.

23. Responding to question 10, he said that of the women victims of physical or sexual violence referred to in paragraph 80 of the written replies, the highest number was in the 18 to 24 age group. Most violence was perpetrated by men, while women who were assaulted tended to know their attacker. The Prime Minister had declared a position of zero tolerance on domestic and family violence.

24. While Australia's criminal justice and health systems were the responsibility of State and Territory governments, the federal Government played an important role in reducing the incidence and impact of violence against women. In recognition of that fact, it had established an advisory council tasked with developing a national plan to reduce violence against women and their children. Once it received a copy of the plan, the Government would make a statement on future programmes and funding. It also planned to work closely with state and territory governments over the coming months on the second phase of the plan's development.

25. In addition, the Government had provided funding for a number of measures aimed at reducing violence against women. It also funded the Women's Safety Agenda and the Women's Services Network. Measures to address violence in the community included a specialized family violence programme; a plan to reduce homelessness; funding for targeted initiatives for early childhood and parenting programmes to prevent child abuse and neglect; and the Men and Family Violence Relationships Services.

26. Specific measures were also in place to address violence against indigenous women, such as the Indigenous Family Violence Programme and the Council of Australian Governments' Package to Address Family Violence and Child Abuse in Indigenous Communities, which aimed to improve law and order and increase indigenous peoples' confidence in the justice system. The Family Violence Prevention Legal Services, meanwhile, provided culturally appropriate assistance to Aboriginal and Torres Strait Islander adults and children who were victims, or at immediate risk, of family violence.

27. **Mr. Campbell** (Australia), responding to question 11, drew attention to paragraphs 93-95 of the written replies.

28. **Ms. Nolan** (Australia), responding to question 12, said that, once assessed as suitable, trafficking victims found in Australia were offered intensive victim support for up to 30 days to give them time to consider their willingness and ability to assist trafficking investigations or prosecutions. Those who remained in Australia for that purpose were offered a comprehensive range of support services.

29. The additional funding allocated to the Support for Victims of People Trafficking Programme in May 2007 would allow the Programme to be extended to trafficking victims who no longer resided in Australia but returned to give evidence in criminal justice proceedings. Since January 2004, 126 clients had passed through the Programme, and as at 20 March 2009, 38 trafficking victims were receiving support under it. The authorities were not aware of any potential trafficking victims who had been unable to access appropriate support and assistance, including repatriation assistance, under the Programme. Potential trafficking victims who chose not to assist law enforcement authorities or whose evidence was considered insufficient were assisted in returning to their home country, unless they were eligible to remain in Australia under another class of visa. In 2008, partner agencies had consulted key Government and non-Government stakeholders as part of a review of the visa framework and Programme. The review's outcomes were currently being considered by the Government.

30. **Mr. O'Flaherty** commended the State party for sending an expert, if small, delegation representing key Ministries, but wondered whether future delegations might include an expert on Australia's federal system. Moreover, he paid tribute to the many non-governmental organizations (NGOs) that had engaged with the Committee during its review.

31. Turning to documentation, he commended the State party for submitting its replies to the list of issues so early and for submitting such an interesting and untypical report, but expressed concern about the latter's form, in particular its scant treatment of issues of high importance to the Committee and its inclusion of old material, including through cross references to Australia's "common core document" (HRI/CORE/AUS/2007) and previous reports. The Committee expected new information on each article every time. He acknowledged the existence of harmonized guidelines on reporting under the international human rights treaties, including guidelines on a common core document and treaty-specific documents (HRI/MC/2006/3), but said that the State party had gone too far and should adopt a more traditional approach.

32. Referring to question 1 on the list of issues, he welcomed the information provided about the national human rights consultation, but wondered what would be done to ensure that all of Australia's international obligations were taken into account and that the consultation's findings reflected the indivisibility and universality of human rights; whether any public information campaigns were being conducted in parallel to the consultation; which parts of the consultation were quantitative and which qualitative; and, in regard to the latter, whether the consultation went beyond requesting the views of experts and used a focus group methodology and other scientifically established methods. He was also curious about the consultation's budget and timelines. Furthermore, in light of reports that human rights law was invoked very infrequently in the federal courts, he asked whether judicial and legal training adequately covered international human rights law, including the Covenant.

33. Referring to question 3, he regretted that the State party had thus far failed to indicate what measures and mechanisms were in place to implement and ensure compliance with the Committee's Views under the first Optional Protocol, but welcomed the return to dialogue on the individual communications mentioned. With regard to those relating to Australia's immigration laws, policies and practices, the State party should provide more details about the measures mentioned in paragraph 13 of the replies and, regardless of any prospective policy changes, reconsider its reaction to the Committee's Views. In that connection, the State party should clarify whether or not detention continued to be mandatory and, if not, what remedy would be given to the individuals concerned. Furthermore, he invited the State party to reconsider its response in the case of *Bakhtiyari v. Australia*; to clarify whether or not the subject of *Young v. Australia* would automatically receive the ex gratia payment to which he was entitled; and to provide information about *D & E v. Australia* and *Shafiq v. Australia*. As for *Cabal and Pasini v. Australia*, he welcomed the robust exchange between the federal Government and the government of Victoria, but recalled that the difficulty of ensuring compliance by individual States was a domestic matter and could not be invoked by the State party as grounds for failing to take action.

34. Referring to question 6, he asked why the outcomes of many of the strategies undertaken were not directly measurable or had not yet been evaluated; when the new national indigenous law and justice advisory body would be established and to whom it would provide advice and support; and when the draft national indigenous law and justice framework would be developed.

35. Referring to question 7 (a), he said that there seemed to be some disagreement on whether or not the Government had announced an overhaul of the native title system. More important, why was the State party so allergic to the word "overhaul"? He welcomed the Government's October 2008 announcement that the Federal Court of Australia would assume a central role in managing all native title-related claims and the December 2008 release of a discussion paper on proposed minor amendments to the Native Title Act 1993, but wished to know whether those aspects were addressed by the Native Title Amendment Bill submitted to Parliament just the previous week. In addition, the delegation should clarify what was meant by the statement that the Government was interested in examining proposals that would encourage agreement making.

36. Turning to question 7 (b), he asked the delegation to say when the National Child Protection Framework would be finalized and how it would address the

specific concerns of indigenous communities; and to provide more information about the Council of Australian Governments' April 2007 agreement to establish a clearing house to improve the evidence base for closing the gaps in indigenous outcomes. The fact that the clearing houses mentioned in paragraph 52 of the replies pre-dated the report of the Aboriginal and Torres Strait Islander Social Justice Commissioner suggested they were inadequate.

37. Referring to question 11, he noted a discrepancy between the delegation's comments on death penalty undertakings and the judgement in *McCrea v. Minister for Customs and Justice*. He was concerned that the judgement had identified a gap in Australia's protections which could lead to a violation of its obligations under the second Optional Protocol. On the related subject of mutual assistance, he noted that, according to section 8, paragraph (1A), of the Mutual Assistance in Criminal Matters Act 1987, a request by a foreign country for assistance under the Act must be refused if it related to the prosecution or punishment of a person charged with, or convicted of, an offence in respect of which the death penalty might be imposed in the foreign country, unless the Attorney General was of the opinion, having regard to the special circumstances of the case, that the assistance requested should be granted. The State party should clarify when such "special circumstances" might arise and how they could be invoked in a manner consistent with its obligations under the second Optional Protocol. Lastly, he wondered how the State party ensured treaty compliance with its second Optional Protocol obligations in the event of pre-charge requests for police-to-police assistance, which were not, it seemed, covered by the Act.

38. **Ms. Keller** thanked the delegation of Australia for its explanation of Australia's reservations to the Covenant. She asked whether, in the light of the fact that, as Mr. Goledzinowski had stated, Australia was firmly committed to achieving adherence with its obligations under the Covenant and other human rights instruments, it was time to reconsider its reservations, in particular to article 10, paragraphs 2 (a), 2 (b) and 3.

39. Turning to question 4 on the list of issues, regarding agents abroad, in view of the assurances provided by Australia in paragraph 20 of its replies, she requested information about any efforts being made to address the problems identified in the non-governmental organization shadow reports regarding the Extradition Act, the Mutual Assistance in Criminal Matters Act, and agency-to-agency assistance treaties, memoranda of understanding and broader policy documents. Clarification would be welcome on why Australia's 2006 review of its extradition and formal mutual assistance operations had excluded consideration of agency-to-agency assistance. She also asked when review's findings would be published and whether it would be used to guide policy and legislative reform.

40. Turning to question 8 on the list of issues, she asked whether Australia was planning to consider and implement the best practice principle identified by the Human Rights and Equal Opportunity Commission in its 2008 report on Preventing Crime and Promoting Rights for Indigenous Young People with Cognitive Disabilities and Mental Health Issues, and if there were any plans to act on the recommendations proposed in that report. Noting that the 2006 Crimes Amendment (Bail and Sentencing) Act precluded courts from considering the cultural background or customary laws of offenders convicted of a federal crime in mitigation or aggravation of the offence when making bail and sentencing decisions, she asked what stage Australia had reached in its consideration of that amendment and what impact it might have on the overrepresentation of indigenous children in the juvenile justice system.

41. With regard to question 10 on the list of issues, concerning violence against women, she enquired as to Australia's position on consideration and implementation of the recommendations contained in the 2008 report by the Office for Women of the Department of Families, Housing, Community Services and Indigenous Affairs, entitled Women, Domestic and Family Violence and Homelessness. She noted that the delegation had not fully answered the Committee's question, and urged it to provide information on the specific number of complaints recorded, civil or criminal investigations conducted, penalties imposed and compensation granted to the victims or their families. It was not sufficient to say that it was difficult to estimate true prevalence rates because definitions and methods of data collection varied between jurisdictions, agencies and surveys.

42. **Mr. Thelin** welcomed the delegation's expression of renewed willingness to engage with human rights issues. Australia was among the top-ranked countries with regard to its respect for human rights and political freedoms, and scored very well in the Transparency International Corruption Perceptions Index. However,

that higher standard meant that it was even more incumbent upon Australia to rectify any flaws identified by the Committee. He echoed Mr. O'Flaherty's remarks about the brevity of the report submitted to the Committee, noting also that there had been some difficulties with the references between the report and the core document. Hopefully that situation could be avoided in future.

43. It was very important to rectify the fact that there was as yet no direct implementation of the Covenant in Australian law, so that it could not be invoked directly in court. Nevertheless, he knew the judiciary to be of a very high standard in Australia and its imaginative interpretation of common law to find principles true to the Covenant gave reason for hope. However, one case that had been brought to the attention of the Committee suggested that the judicial atmosphere in the High Court was not conducive to such interpretation in relation to protection for individuals; the delegation's comments on that would be appreciated.

44. With regard to question 5 on the list of issues, it was encouraging to note that the measures contained in the Anti-Terrorism Act would be reviewed in 2010 and that intelligence legislation would be reviewed by 2016. It was also encouraging that a post of national security legislation monitor was to be established in the Prime Minister's Office to ensure that there were safeguards in place. However, perhaps those measures were too little too late? Information on the response to the conclusions and recommendations of the 2006 report of the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism (A/HRC/4/26/Add.3), particularly with regard to the definition of the term "terrorist act" and the listing of terrorists and associated entities, would be welcome. Australia should be commended for its efforts to combat global terrorism; however, safeguards were necessary, and the proper balance was sometimes difficult to strike — in Europe, even the United Nations Security Council had been criticized for its practice of allowing individuals to be put on the "terrorist watch list". He therefore suggested that when Australia came to review its legislation, it might wish to look at how the matter had been addressed in Europe. The Special Rapporteur had also expressed the view that the concept of incitement to terrorism in Australia was too vague. Moreover, there were weaknesses in the Australian security system; for example, allowing police officers to be present while security service officials conducted interrogations indicated a possible lack of demarcation between intelligence-gathering and criminal investigations, which weakened the protection of individuals under the Covenant. Provisions of the Anti-Terrorism Act appeared to violate article 9 (3) of the Covenant, putting the onus of proof on the suspect rather than the authorities. There also appeared to be a risk of violating the tenet *ne bis in idem*, if, after being the subject of a control order, a person was then indicted on a criminal charge. The Committee needed to be told if the Government of Australia had taken steps towards implementing the recommendations of the Special Rapporteur and if not when it would do so. Australia should not wait until 2010 to reform the system. He also asked the delegation to give an indication as to what increase in terrorism-related offences being processed by the Government had taken place since the 2006 report.

45. Turning to question 9 on the list of issues, he said he was pleased to see that steps had been taken to act as a result of the report on Protection of Aboriginal Children from Sexual Abuse in the Northern Territory and welcomed the measures being considered. However, further clarification would still be appreciated. The 2007 Social Justice Report of the Human Rights and Equal Opportunity Commission had indicated some non-compliance with the Covenant in its analysis of the relationship between existing legislation and the Anti-Discrimination Act. It had made 14 recommendations, including several on that issue, suggesting that legislation needed to be adjusted in order to avoid conflicts. He would like to know to what extent the recommendations presented in October 2008 included those recommendations by the Commission.

46. **Mr. Bhagwati**, referring to question 12 on the list of issues, asked for further information about how many people who had been trafficked into Australia had been rescued and supported by the Support for Victims of People Trafficking Program, and enquired as to the nature of that support. Clarification was needed as to the circumstances under which Criminal Justice Stay Visas were issued, and whether the Government was planning to change its long-standing visa provisions following the conclusions of the review that had been undertaken.

47. **Mr. Amor** expressed his surprise that the Government of Australia was maintaining its

reservation to article 20 of the Covenant, given that the country attached great significance to democratic values and human rights. He recalled having asked, on the occasion of the Committee's consideration of Australia's fourth report, whether the authorities planned to address the issue of speech based on intolerance and hatred, while still upholding freedom of expression. Such speech still existed. It was possible to ban incitement to hatred and war propaganda and still have legitimate and controversial debate. Additionally, article 20 was not one of the articles specified under article 4 of the Covenant that could not be derogated at a time of public emergency. The Committee had expanded on that in General Comment No. 29 (CCPR/C/21/Rev.1/Add.11), paragraph 13 (e), which stated explicitly that declaration of a state of emergency pursuant to article 4 (1) of the Covenant could not be invoked to justify a State party to engage itself, contrary to article 20, in propaganda for war or in advocacy of national, racial or religious hatred that would constitute incitement to discrimination, hostility or violence. Australia's reservation to article 20 therefore could raise legitimate questions, so further comment about both the factual and legal aspects would be appreciated.

48. With regard to Australia's follow-up to the Committee's Views, he noted that of the 11 cases referred to in the report where the Committee had expressed the view that there were actual or potential violations of the Covenant, Australia had not accepted the Committee's Views in 10 cases. In the other, *Cabal and Pasini v. Australia*, the report stated that prison management was a state responsibility, but that steps had been taken to ensure that a similar situation did not occur in the future. It should be noted that the Committee was dealing with Australia and not the State of Victoria, to ensure compliance with the Covenant. As for the other 10 cases, he had no doubt that Australia was acting in good faith, and he acknowledged its important role in the development of human rights; nevertheless, further explanation was needed as to why the Committee's Views had been systematically rejected. It was hard to believe that the Committee had been wrong in all those cases.

49. **Ms. Chanet** echoed the views already expressed by other members of the Committee with regard to difficulties in reading the report. The intent of the harmonized reporting guidelines was to avoid duplication. It was Member States that had been behind the creation of separate treaty bodies, and States could not neglect the rules of those bodies. The core report had not been translated into all official languages. In addition, the Internet links provided in the very short periodic report were to documents only available in English. The report that had been submitted did not provide adequate responses, only badly referenced theoretical ones, it did not address the recommendations that had been made, and rejected the Committee's Views. That demonstrated an attitude towards the human rights treaty bodies that was all the more regrettable in the light of the fact that Australia did not have a bill of rights, so that reports and communications were the only form of protection for its citizens.

50. In his introductory statement, Mr. Goledzinowski had indicated that there had been a change with regard to handling the detention of immigrants. Australia had given a rather extraordinary interpretation of article 9 of the Covenant, asserting that it referred only to domestic and not international law. It was not clear whether that meant past, present or future domestic law, or how it tallied with the ongoing review of those cases. She asked the delegation to explain clearly Australia's legal position with regard to the Committee's Views, in particular the Views pertaining to article 9 of the Covenant. She was pleased to note that Australia had welcomed the Committee's General Comment on the Optional Protocol, which reiterated the obligation of States parties to act both in a considered manner and in good faith.

51. Echoing Mr. Thelin's questions regarding the Anti-Terrorism Act, she drew attention to paragraph 47 of the report of the Special Rapporteur, which expressed the concern that there was no legal recourse regarding warrants issued under the authority of the Anti-Terrorism Act. The Committee understood that there would be reviews in 2010 and 2016, but further explanation would be appreciated on the basis for those reviews and on Australia's definition of terrorism.

52. She expressed appreciation for the delegation's responses on the issue of extradition, and asked whether assurances given with regard to extradition to countries where the person would be at risk of the death penalty also extended to the risk of torture.

53. **Mr. Sanchez-Cerro** expressed regret at Australia's decision not to withdraw its reservations to articles 10, 14 and 20 of the Covenant. No arguments

had been heard as to why those reservations, which were on issues essential to the Covenant, had been maintained.

54. There were cases of indefinite detention of illegal immigrants who had committed no crime and were guilty of nothing more than immigration-related administrative irregularities. In that connection, it would be helpful to know whether people had been held for more than two years without charges and whether Australian law permitted indefinite detention. The Migration Act of 1958, while old, had not been changed; it had in fact been upheld repeatedly. Moreover, there was no absolute implementation of the principle of non-refoulement of refugees, nor was there recognition by the State of the need to abide by articles 9 and 10 (1) of the Covenant. The other sections of article 10 were under reservation.

55. Human rights were not protected in Australia at the State or federal levels, or in the Constitution. There was a lack of individual guarantees. There was no domestic law requiring the laws of Australia to be compatible with the Covenant.

56. Australia had shown a reluctance to act in response to concerns expressed by the Committee in its recommendations and individual communications, for example, Communication No. 560/1993, which had been the first of about a dozen cases in which the State had argued that ecommendations and observations of the Committee were non-binding. In fact, all States were obligated to abide by the principle of *pacta sunt servanda*.

57. **Mr. Nigel Rodley** said that Australia was alone among the Commonwealth nations in not having a system of human rights legislation that could be adjudicated in a court of law. The Committee did not take the position that States were obligated to incorporate international treaties into domestic law; however, experience showed that in the absence of such legislation, there were significant gaps between international norms and domestic law. It should be said, however, that abuses on the ground could and did happen anywhere regardless of whether the Covenant had been incorporated into national law.

58. The written response stated (para. 19) that in case of conflict between the Covenant and international humanitarian law, the latter applied as *lex specialis*. In fact, the International Court of Justice had stated clearly that that was not necessarily the case. In some cases, international humanitarian law was *lex specialis*, while in other cases, human rights law was *lex specialis*, and in still others, both applied. He wondered, therefore, if the State party was taking the view that an individual who was not protected under the Geneva Conventions could be treated in any way that the State party wished. That argument had been made in regard to international terrorists not belonging to a Contracting Party who might not be protected under the Geneva Conventions and might even be so-called unlawful combatants. Or perhaps the State party took the view that the Geneva Convention relative to the Treatment of Prisoners of War applied to anyone in the hands of a State party.

59. He wondered whether there was a difference between international armed conflict and non-international armed conflict. The State party was a party to the Protocol Additional to the Geneva Conventions relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), which said in its preamble that individuals were under the protection of international instruments relating to human rights. Therefore, he wished to know if the State party believed that in cases of non-international armed conflict only humanitarian law applied, and international human rights law did not.

60. In reference to article 7, there were questions about Major O'Kane, an Australian military lawyer who, apparently at the request of the United States Government, had reviewed the findings of the International Committee of the Red Cross regarding the notorious practices at Abu Ghraib and had found those practices consistent with the Geneva Conventions. Clarification was needed as to whether the Government of Australia agreed with that; if it did not, he would appreciate it if the delegation could present the State party's position regarding Major O'Kane and explain how he had ended up in that role.

61. Another question had to do with the admissibility in court of evidence obtained under torture. While it was not common practice for Australian courts to admit evidence acquired in violation of article 7, there was no legislation ruling it out. The decision was left up to the courts. That was relevant in the case of Jack Thomas, an Australian citizen who had allegedly been detained and tortured in Pakistan. The statements obtained during the alleged ill treatment had been used in a trial in Australia, leading to a conviction, which had

subsequently been overturned on appeal. While it was gratifying that the conviction had been overturned, it was troubling that the law was not sufficiently clear for the court to understand that such evidence should not have been admitted. The law should be clear that any information or statements obtained in violation of article 7 were not admissible in any proceeding, except possibly one against the person who had inflicted the treatment.

62. Clarification was also requested regarding non-refoulement. The legislation in force contained a presumption against such acts, but the relevant minister nonetheless retained discretion to extradite regardless of the risk of torture. There had been a report of a Mr. Zhang, who, after extradition to China and harsh treatment, had committed suicide, and another report in regard to Akram al-Masri, extradited to Gaza and then killed because he was wrongly suspected of collaboration with the Israeli authorities. It was not clear what protections there were in such cases, whether the State sought assurances and whether such assurances involved monitoring and follow-up of how people were treated. Nor was it clear how protections were guaranteed in practice.

63. **Mr. Fathalla** expressed doubts in regard to the reply to question 5, which stated that the Australian Government regularly conducted internal reviews of bills, including anti-terrorism bills, for compatibility with domestic and international human rights obligations. That section had to be read in the light of paragraph 29 of the core document, which said that each of the six states of Australia had the right to adopt laws for the peace, order and good government of the state. He wondered what measures were taken to ensure the compatibility of laws with the Covenant.

64. **Mr. Salvioli** requested further information about measures to ensure the effective implementation of the Covenant throughout the states and territories of Australia, what results those measures had yielded and the process for reviewing laws incompatible with the Covenant.

65. Regarding reservations to the Convention, it was not sufficient for a State party to say simply that it maintained them; each time it came before the Committee, it must reconsider the reservations. It would be helpful to know what sort of process existed for debate on withdrawal of reservations. Reservations severely hampered the implementation of the Covenant within the State party.

66. Implementation of the Covenant by the judiciary was a matter of concern, and in that context, information on any human rights training in universities and law schools or plans for such training, as well as on whether there was any specific mechanism for training the judiciary in international human rights law, would be appreciated. It would be helpful to know the degree to which the judiciary was implementing the Covenant.

67. There were credible reports from respected non-governmental organizations such as Amnesty International about widespread domestic violence. Conviction statistics for domestic violence would be appreciated, as would information as to whether there was training available to the judiciary regarding laws aimed at eliminating domestic violence.

68. The idea of establishing a project for enshrining indigenous jurisdiction was a welcome one. He wondered whether the Covenant was being taken into account in that activity and to what extent the Committee's work on that issue was known in the relevant bodies of the State party.

69. Questions posed by other members of the Committee in regard to extradition in cases involving the risk of torture and also the death penalty were appropriate. The question should also cover women who would be forced to undergo female genital mutilation if extradited.

70. *The meeting was suspended at 5.40 p.m. and resumed at 5.50 p.m.*

71. **Mr. Campbell** (Australia) said that mutual assistance was defined by his Government as the process used to provide and obtain formal Government-to-Government assistance in criminal investigations and prosecutions. It was usually used where material was sought in a form admissible in evidence. Police assistance was direct cooperation between police forces of different countries in criminal investigations, occurring usually prior to mutual assistance. In matters concerning capital offences, the Mutual Assistance in Criminal Matters Act 1987 required the Attorney General or Minister for Home Affairs to refuse requests for assistance, unless they believed that special circumstances of the case indicated that the request should be granted. The term

"special circumstances" was not defined in the Act, but the explanatory document to the Act stated that assistance would not be granted unless the foreign country gave an assurance that the death penalty, if imposed, would not be carried out. If the assistance sought was of an exculpatory nature, then a death penalty assurance was not required. When assistance was requested in the investigation of a capital crime where charges had not yet been made, the Attorney General or the Minister for Home Affairs did have the discretion to refuse assistance. Special circumstances were considered on a case-by-case basis. It was not possible to give a comprehensive list of circumstances considered special circumstances.

72. Police-to-police assistance could be provided to foreign countries until charges were made for an offence which attracted the death penalty. The Australian Federal Police could not provide assistance in cases where charges for a capital offence had been made, unless the Minister for Home Affairs approved the continuation of the assistance.

73. The Attorney General had requested a review of assistance procedures in foreign investigations of crimes involving the death penalty. No information on that review could be provided at the current time.

74. The provision of information by the Australian Federal Police to the Indonesian police in the case of the Bali Nine had been considered in federal court in Australia in January 2006. It was concluded that the Australian Federal Police had acted lawfully and in conformity with their duties in providing that information. The Government would vigorously support clemency pleas by the Australians facing the death penalty in Bali.

75. **Mr. Illingworth** (Australia) said that detention was mandatory as a component of strong border control and was used for specific groups, including all unauthorized arrivals, to manage health, identity and security risks, as well as for unlawful non-citizens who presented an unacceptable risk to the community and unlawful non-citizens who had repeatedly refused to comply with their visa conditions. A core value of the Government was that indefinite or otherwise arbitrary detention was not acceptable. Length and conditions of detention, including appropriateness of accommodation and services provided, were subject to regular review. For unauthorized arrivals, review mechanisms were in place or being put in place to ensure the removal of impediments to resolving cases and enabling release either by granting a visa or through departure, if there were no grounds for remaining in Australia. All other immigration detention decisions, having to do with those who presented an unacceptable risk or did not comply with visa conditions or where it was necessary to facilitate removal if there was no basis for remaining in the country and the individual in question was not cooperating with departure arrangements, were made on an individual basis.

76. The stated policy of Australia was that no person would be removed if to do so would be a breach of international protection obligations. The death of Mr. Al-Masri had occurred nearly six years after his departure from Australia. The Government had investigated the circumstances of the case and was satisfied that the factors surrounding his death were not related to the issues before Australia at the time when he was resident there. What had happened was the result of an inter-family feud. It was believed that the other individual mentioned had been appropriately assessed through the refugee assessment process, including a tribunal review of the merits of his claims. His removal from Australia had not been a breach of international obligations.

The meeting rose at 6.05 p.m.